CASE NO: 87-1124

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WALTER KENNETH BYRD,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS, WARREN COUNTY, OHIO

PETITIONER'S REPLY TO REPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES D. RUPPERT
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Telephone: 513/746-2832
Counsel of Record for
Petitioner

THOMAS G. EAGLE
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Co-Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REPLY ON STATEMENT OF THE CASE

Several inaccuracies appear in the Respondent's Statement of the Case. First, the Respondent states that Deputy Goodall was "aware" of the surveillance of the Petitioners rooms, which gave him further cause to be wary of the Petitioner. In fact, he actually took part in that surveillance. The week long surveillance detected absolutely no criminal or even suspicious behavior at those rooms, and gave the officers no cause to take any action against the Petitioner.

Further, the "informant's tip" referred to by the Respondent was merely a statement by an unidentified female that there were persons in the area who were preparing for a major drug

transaction, and who were armed and dangerous. But, that alleged informant never gave the location or identity of those persons to which she was referring. The police merely followed the informant (who was a long time friend of the Petitioner) until she went to the Petitioner's room, and the officers then began their surveillance. Contrary to the Respondent's assertion, no one identified the Petitioner as a criminal suspect.

In addition, there was much discrepancy at the trial as to exactly how the officer got into the Petitioner's room, and where he was (in the room already or outside the open door) when he saw the strap hanging out of the open suitcase. It is by no means

conclusive that he was where he was lawfully permitted to be when he saw the shoulder strap.

Finally, several other important misstatements of fact are made within the text of the Respondent's Brief, which will be pointed out in the text of this Reply where they are relevant.

ARGUMENT

REPLY ON FIRST QUESTION PRESENTED FOR REVIEW:

Both Defendants, Walter Byrd and Mark Mueller, were charged with and convicted of the same offense: aggravated trafficking in controlled substances, requiring proof that they prepared a controlled substance for shipment or distribution. O.R.C. §2925.03(A)(2). The evidence disclosed that both Defendants were present in the motel room. Pursuant to the challenged search, the officers recovered various items of drug paraphernalia, which were scientifically tested and failed to disclose any trace of any controlled substance. The State's laboratory expert testified that the

equipment had not been used to prepare any controlled substance. The only controlled substance recovered was found in three tiny vials in a dresser drawer (containing approximately .3 grams of a mixture of cocaine, lidocaine, and caffeine)

In addition, the State's testimony clearly demonstrated that Mr. Mueller (the acquitted Codefendant) refused maid service at the rooms, and that both rooms received a large number of phone calls. There was a large amount of trash discarded from the rooms daily, which also failed to disclose any wrongdoing. There was no cash obtained in the search, other than approximately $20.00 in change.

Based on this body of evidence,

the jury returned verdicts of guilty as to both Defendants. The Court of Appeals concluded that the evidence was not sufficient to convict Mueller and yet in a separate opinion concluded that the same evidence was sufficient to affirm the Petitioner's conviction.

Admittedly there are some facts that differentiate the two Defendants. The Petitioner was admittedly a former cocaine addict, and did own and had used the various paraphernalia items in the past. The testimony was uncontradicted though that this paraphernalia was not present at the motel until the day before the arrest, and that it had been in storage for six months to a year prior to the arrest. None of these differentiating factors

have anything to do with whether either of these Defendants had actually used that paraphernalia to prepare a controlled substance, the material element of the offense charged. All evidence that could have supported the convictions apply to both Defendants equally. That evidence necessary to sustain a conviction on this charge is common to both Defendants.

The Respondent asks this Court to require a "discriminatory motivation" to find a violation of the fifth and fourteenth amendments as to equal protection and due process of law, without citation to authority. How could it be any clearer that the Petitioner had the due process clause of the United States Constitution

(requiring proof beyond a reasonable doubt) applied to him in a discriminatory fashion, when a codefendant was acquitted by the Court of Appeals based on the exact same evidence used to convict him, a distinction that was made without any basis (much less a rational basis). He was absolutely denied equal protection of the law, and this Court is the last hope to redress the prior Court's error.[1]

---

1 The greatest irony in this case is that the Petitioner is still in prison, whereas the other Defendant, Mark Mueller, now has a claim pending against the State of Ohio under the Ohio wrongful imprisonment statute, which entitles Mark Mueller to several thousand dollars in damages for the time he was wrongfully imprisoned.

REPLY ON THE SECOND QUESTION PRESENTED FOR REVIEW

The Respondent relies upon an erroneous relation of the facts to support its arguments that the search and seizures in this case were constitutional.

In regard to the Respondent's Section "A," the officer was aware of police surveillance on the Petitioner's rooms, but as has been previously stated, he knew that the surveillance had turned up nothing criminal or suspicious. Further, the officer's detention of the Petitioner clearly exceeded the limits of a Terry stop.

Petitioner disputes the assertion that "three levels of judiciary" have

held that the detention did not exceed Terry. The Trial Court held that the police officers' act of entering the room and "frisking" and "Mirandizing" the Defendants was reasonable, but made no finding as to whether the detention later exceeded permissible limits. The Court of Appeals, held that "the continued detention of the [Petitioner] in the room went beyond the scope of a permissible Terry stop and rose to the level of an arrest . . . . The arrest was not supported by probable cause." See Appendix to Petition, E-14 to E-17. The Ohio Supreme Court (the Respondent's third "level of judiciary") refused to hear the merits of this case.

The Respondent incorrectly states,

in both Sections "C" and "D" that the search of the Chevrolet yielded three vials of what "later proved to be cocaine." The record is clear and unequivocal that the State's expert witness flatly admitted that those vials, recovered from the Chevrolet, subjected to scientific testing, contained absolutely no controlled substances! There was no illegal substance in the three small vials taken from the Chevrolet, which search led to the search warrant for the motel rooms.

Finally, the State cannot rely on United States vs Leon, 468 U.S. 897, 82 L.Ed. 2d 677 (1984), for protection from the suppression of the evidence herein, nor to deny there

is a substantial constitutional question to be decided. An officer must have had "objectively reasonable reliance" on the warrant to receive the benefit of the so called "good faith" exception to the exclusionary rule. Leon, supra at 698. In the Petitioner's case, the officers could not have had objectively reasonable reliance on this warrant. The warrant did not contain a single objective fact to support a finding of probable cause to believe that the Petitioner had engaged in criminal activity, involving the use of illegal substances. See Leon, supra at 693 n.13.

In addition, this Court placed a limitation (that is applicable to the instant case) on the "good faith"

exception to the warrant requirement. A warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" cannot justify "good faith" reliance. Leon, supra at 699, quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975).

The warrant in the instant case is based only on the undisclosed and unproven informant's tip, the officer's suspicions as to the white powder found in the car, and the items found in the room (which were not determined to be illegal). These same items were taken pursuant to a prior illegal search and therefore cannot be the basis for a probable cause determination, regardless of the application of Leon.

Finally, Leon should not be extended to the circumstances herein. If the warrant in this case is held to be reliable enough to avoid the exclusionary rule, police officers will be given future permission to search based on suspicion and conjecture. This result is clearly contrary to the fourth amendment and to the Leon decision. See Leon, supra at 698-99, 693 n.13.

CONCLUSION

For the above stated reasons, and those reasons previously stated, the Petitioner expressly requests this Court to accept this case for full review on the merits.

Respectfully Submitted:

James D. Ruppert
Counsel of Record
for Petitioner
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Telephone: 513/746-2832

Thomas G. Eagle
Co-Counsel for
Petitioner
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Telephone: 513/746-2832

PROOF OF SERVICE

I hereby certify that I have this 21st day of April, 1988, mailed three (3) copies of the within Reply to Timothy Oliver, Prosecuting Attorney, Warren County Prosecutor's Office, Law Building, 313 East Warren Street, Lebanon, Ohio 45036.

Respectfully Submitted:

James D. Ruppert
Counsel of Record
for Petitioner
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Telephone: 513/746-2832

Thomas G. Eagle
Co-Counsel for
Petitioner
1063 E. Second Street
P. O. Box 369
Franklin, Ohio 45005
Telephone: 513/746-2832